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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DISPATCHED BY

In re Applications of)	MM DOCKET NO. 92-308
)	
CAROLINE K. POWLEY d/b/a UNICORN SLIDE)	File No. BPCT-900518KO
)	
TRUDY M. MITCHELL)	File No. BPCT-900726KG
)	
For Construction Permit for a New)	
Commercial Television Station on Channel 54)	
in Slidell, Louisiana)	

MEMORANDUM OPINION AND ORDER

Issued: March 25, 1993;

Released: March 26, 1993

Background

1. This is a ruling on a Joint Request For Approval Of Settlement Agreement ("Joint Request") that was filed on February 1, 1993, by Caroline K. Powley d/b/a Unicorn Slide ("Powley") and Trudy M. Mitchell ("Mitchell"). Powley also filed on February 17, 1993, a Supplement To Settlement Agreement ("Supplement"). On February 26, 1993, Powley filed a further Statement ("Statement").

2. On March 5, 1993, Mitchell filed a Request For Itemization Of Expenses ("Request") and on that same date, Powell filed a Statement which included documentation that is relevant to its itemization of expenses ("Further Statement"). On March 10, 1993, Powley filed Comments On Request For Itemization Of Expenses ("Powley Comments"). On that same date, Mitchell filed Comments Of Trudy M. Mitchell ("Mitchell Comments"). On March 18, 1993, the Mass Media Bureau ("Bureau") filed Comments On Joint Request For Approval Of Settlement Agreement. The Bureau supports the settlement in the amount that is agreed to by the parties.

Facts And Discussion

3. Powley and Mitchell are the only two mutually exclusive applicants for a construction permit for a new FM Station on Channel 54 at Slidell, Louisiana. See Hearing Designation Order DA 92-1681, released January 11, 1993.

4. The Joint Petition contemplates that Powley's application will be voluntarily dismissed with prejudice in return for a payment of a sum of money not to exceed \$35,000, representing an amount that is no more than Powley's

actual legitimate and prudent expenses. Mitchell will receive the grant.¹ The proposed agreement can be effected because Powley has demonstrated that its allowable costs total approximately \$44,000, and Powley has agreed to accept from Mitchell a lesser amount as a payoff.

5. The following standard was set by the Commission for the submission of professional expenses in "statement form:"

It [is] not necessary, however, to submit detailed descriptions of the number and job levels of persons providing professional services, or information as to hours and billings for professionals of various job levels. Nevertheless, a brief description of the nature of the specific activity and its connection with the comparative new proceeding should be provided.

Amendment of Section 73.3525, 6 F.C.C. Rcd 85, n. 54 (1990). (Emphasis added.)

6. On February 1, 1993, counsel for Powley submitted a signed Statement In Support Of Settlement under the letterhead of Baraff, Koerner, Olender & Hochberg, P.C., which recited that the law firm has been paid or is owed a total of \$17,800, plus expenses in the amount of \$469.11. The services are described as follows:

Maintaining the accuracy and currency of Ms. Powley's application; analyzing her comparative prospects; analyzing the application of her opponent, Trudy Mitchell, and developing and implementing strategy for bringing certain deficiencies in that application to the Commission's attention, which took the form of fairly extensive pleadings between us and counsel for Trudy Mitchell; counseling Ms. Powley with regard to the Hearing Designation Order and advising her of her procedural and substantive obligations; and negotiating, reaching and implementing a settlement with Ms. Mitchell in this proceeding.

The submission by Powell's attorney meet the Commission's standard. There was no itemization of the firm's out-of-pocket expenses but facially such expenses in the amount of \$469 are found to be reasonable in light of the scope of work performed.

7. On March 5, 1993, Powley submitted a sworn Declaration of her engineer, Mel Eleazar, who affirmed his performing the following work for Powell's Slidell application:

- engineering site study \$ 3,800

¹ The grant to Mitchell will be conditioned on notification by Mitchell to AM Station WSLA in Slidell of a possible interference. Mitchell also must construct specified detuning apparatus. See HDO at Para. 12 and p. 6, *infra*.

- tower placement study	\$ 4,800
- engineering for application	\$ 5,200
- review of Mitchell's engineering and consulting with counsel	\$ 5,200
- out-of-pocket expenses ²	\$ 875
	\$19,875

Mr. Eleazar also described in "statement form" that his work on behalf of Powley for the Slidell application included initial engineering, a tower placement study, his completion of engineering required for the application process, his review of the opposing party's engineering, consulting with legal counsel, and assisting in oppositions that were filed against Mitchell's engineering. See Mel Eleazar Declaration at 1. The submission of the engineering expenses also meet the Commission's standards for professional work. See Para. 5, supra.

8. Ms. Powley filed a summary of expenses with her Statement of March 5, 1993, wherein she listed fifteen line-item expenses which totalled approximately \$6,370. ³ Powley has not included any line-item for her services which would not be a recoverable cost. See Amendment Of Section 73.3525, supra at 87. Except for her expenses in visiting New Hampshire, the line item expenses of Ms. Powley are allowed.

Mitchell's Concerns About Powley's Expenses

9. The Bureau's Comment states that the Settlement is limited to a payout to Powley of \$35,000 and that Powley's itemized expenses in that amount are legitimate and prudent costs that are appropriate for payment. However, there are unauthorized expenses for which Powley seeks approval. It is these unauthorized costs that are the subject of Mitchell's post settlement pleadings that are referred to above. For example, Powley would include in the universe of allowable costs the fees of Ron Baptist ("Baptist") who is represented to be a non-successful "facilitator" of the Settlement. Baptist submitted a "sworn statement" which is attached to the Statement submitted by Powley on February 26, 1993. It refers to a contingent fee of \$15,000 which Baptist had first negotiated with Mitchell. According to Baptist, negotiations stalled and since there was no deal facilitated, Baptist withdrew from the process with no fee. Later, Powley requested Baptist's assistance and paid Baptist \$2,500. Baptist later accepted another contingent arrangement with Powley. However, there is no representation that Baptist received \$15,000 from Powley. There would be no

² Mr. Eleazar specifies related expenses including the cost of obtaining contour maps and related engineering materials, long distance telephone calls, postage and duplication costs.

³ Powley's major non-professional expenses were her filing fees of \$2,500. She listed fourteen other items such as maps and travel to Slidell. Her travel costs to New Hampshire in the amount of \$719 are not allowed.

authorization under the Commission's rules to approve an unpaid contingent fee on the assertion that the fee was justified as a "prudent" or as an "out-of-pocket" expense. See Amendment Of Section 73.3525, 6 F.C.C. Rcd 85, 87 (1990).⁴ Powley will be limited to recovering only those expenses incurred in the preparation, filing, prosecution and settlement of the application. See 47 C.F.R. Section 73.3525 (i).⁵ However, Powley's other itemized expenses, which are legitimate and prudent and which are shown to have been incurred in connection with this proceeding, are limited to the \$35,000 settlement amount and to expenses which qualify as allowable under the rule. The non-allowable fees of Baptist and the other excluded expenses referred to in fn. 5 above are superfluous and need not be further considered.⁶

4 It would seem contrary to Commission policy to approve payments for Baptist as a facilitator who first unsuccessfully represented Mitchell and then, with information gained from that "client," terminated the relationship and with the knowledge gained, crossed to the other party Powley and undertook a similar contingent relationship. (Mitchell represents that Baptist is not an attorney and that therefore considerations of legal ethics would not apply to Baptist's conduct.) The Commission permits only a payment for expenses that are actually incurred and that are legitimate and prudent. That limitation would exclude a contingent fee for unsuccessful attempts at facilitating the terms of a settlement. See Amendment Of Section 73.3525, supra at n. 54 (only expenses that are legitimately and prudently incurred in preparing and negotiating a settlement are recoverable).

5 The Sworn Statement of Baptist does not meet the Commission's criteria. Other charges would not be allowed which are not clearly tied to this proceeding such as \$500 for Baptist's "out-of-pocket" expenses which are not itemized; non-segregated expenses of Gerald Proctor; unspecified telephone calls in an amount of \$887.24 which include calls to Australia and North Carolina; telephone expenses of \$324.08 that are not associated with the application; unexplained travel expenses in 1990 and in 1991 before the case was designated for hearing; non-specified expenses of Baptist; and expenses of Powley for travel to Nashua, New Hampshire in the amount of \$719.

6 Mitchell's Request for an itemization was based on Powley's initial claim for Baptist's fees and expenses, apparently reduced by Baptist to a \$7,000 fee and \$500 for expenses. There were no itemizations of hourly time spent or of expenses paid such as transportation, postage, etc. Powley submitted more detailed itemized costs on the same date that Mitchell filed her request for an itemization. Powley also raised an inference that some expenses may be related to other pending Commission applications. But there is no nexus shown between other filings of Powley and this case as the basis for that suggestion. Also, Mitchell has stated a categorical denial in her responsive pleading. But see Powley Comments. See also Mitchell Comments in which Mitchell suggests that a hearing session would be in the public interest in which Powley would be required to further document her claimed expenses and negate any inference that expenses for other filings were submitted here. The Bureau objects to any such hearing. The Presiding Judge has determined that both parties have agreed to settle for an approvable amount of money. There is no interest is to be served in holding a hearing.

Settlement

10. The statutory standard to be applied in accepting or rejecting a settlement proposal provides:

The Commission shall approve the agreement only if it determines that (a) the agreement is consistent with the public interest, convenience or necessity, and (b) no party to the agreement filed its application for the purpose of reaching or carrying out such agreement.

Communications Act of 1934, as amended, §311 (c) (3). See Oak Television of Everett, Inc., et al., 92 F.C.C. 2d 926 (Review Bd 1983).

11. In this case, the Joint Petition was filed timely in accordance with §73.3525. The parties have represented under penalty of perjury that their applications were not filed for the purpose of reaching or carrying out a settlement agreement and that the agreement is in the public interest. The Bureau has no objection to approving the settlement. It is determined that the parties have complied with 47 C.F.R. §§73.3525 (a)(1) and (a)(2) of the Commission's rules. In addition, a review of Powley's line-item expenses totalling in excess of \$35,000 as of February 1, 1993 (allowable legal and engineering expenses alone exceed that amount) has been made by the Presiding Judge and those allowable expenses are found to be legitimate and prudent in accordance with 47 C.F.R. §73.3575(a)(3) (1991).

12. There has been compliance with the local publication requirement of the Commission's rules. 47 C.F.R. §73.3594(g). The parties also have paid the required hearing fees. 47 C.F.R. §1.221(g). Commission resources will be conserved by the termination of this case prior to hearing. In addition, the public interest will be served by approval of this agreement which will eliminate the need for protracted litigation and the corresponding utilization of resources, and which ensures that a new FM service will be delivered to Slidell, Louisiana at an earlier date. Accordingly, it is appropriate that the proposed settlement be accepted.

ORDER

IT IS ORDERED that the Joint Request For Approval Of Settlement Agreement filed on February 1, 1993, as supplemented by Caroline K. Powley d/b/a Unicorn Slide and Trudy M. Mitchell, IS GRANTED and the Settlement Agreement IS ACCEPTED.

IT IS FURTHER ORDERED that the Request For Itemization filed on February 5, 1993, by Trudy M. Mitchell IS DENIED as moot.

IT IS FURTHER ORDERED that the application of Caroline K. Powley d/b/a Unicorn Slide (File No. BPCT-900518KO) IS DISMISSED with prejudice.

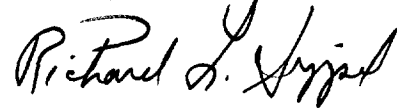
IT IS FURTHER ORDERED that the application of Trudy M. Mitchell (File No. BPCT-900726KG) to construct a New FM Station at Slidell, Louisiana IS GRANTED,

subject to the following condition:

Prior to construction of the tower authorized herein, Trudy M. Mitchell shall notify station WSLA, Slidell, Louisiana, so that, if necessary, the AM station may determine operating power by the indirect method and request temporary authority from the Commission in Washington, D.C. to operate with parameters at variance in order to maintain monitoring point field strengths within authorized limits. Trudy M. Mitchell also shall be responsible for the installation and continued maintenance of detuning apparatus necessary to prevent adverse effects upon the radiation pattern of the AM station. Both prior to construction of the tower and subsequent to the installation of all appurtenances thereon, a partial proof of performance, as defined by Section 73.154(a) of the Commission's Rules, shall be conducted to establish that the AM array has not been adversely affected and, prior to or simultaneous with the filing of the application for license to cover this permit, the results shall be submitted to the Commission.

IT IS FURTHER ORDERED that the admissions session set for June 2, 1993, and the hearing set for June 7, 1993, ARE CANCELLED and this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in dark ink, appearing to read "Richard L. Sippel", is written over the printed name.

Richard L. Sippel
Administrative Law Judge